NO. 3000

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE

NINTH CIRCUIT

CHARLES E. KING,

Appellant,

vs.

WILLIAM O. SMITH, E. FAXON BISHOP, ALBERT F. JUDD and ALFRED W. CARTER, as Trustees under the Will and of the Estate of Bernice Pauahi Bishop, deceased,

Appellees.

BRIEF FOR APPELLEES

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Filed this ..... day of ....., 1917.
F. D. MONCKTON, Clerk.
By ....., Deputy Clerk.

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BRIEF FOR APPELLEES.

STATEMENT.

Mrs. Bernice Pauahi Bishop of Honolulu, Hawaii, died testate in Honolulu, October 16, 1884, leaving an estate of great value, the residuary and larger portion of which was bequeathed and devised to five trustees "to hold upon the following trusts, namely: to erect and maintain in the Hawaiian Islands two schools, each for boarding and day scholars, one for

boys and one for girls, to be known as, and called the Kamehameha Schools." Other provisions of a charitable nature were contained in the Will.

Will and Codicils, Record, pp. 73-91.

Having provided for the creation of a large charitable trust, the testatrix in the fourteenth clause of her will provided for the appointment of trustees in succession as vacancies should occur in the natural course of events. It is the language of this clause that the Supreme Court of the Territory of Hawaii has construed, deciding that by it a power of appointing new trustees was given to the majority of the persons who comprised the justices of the Supreme Court of Hawaii. It is from this construction that appellant has appealed to this Court.

The fourteenth clause reads as follows:

"Fourteenth: I appoint my husband Charles R. Bishop, Samuel M. Damon, Charles M. Hyde, Charles M. Cooke, and William O. Smith, all of Honolulu, to be my trustees to carry into effect the trusts above specified. I direct that a majority of my said trustees may act in all cases, and may convey real estate, and perform all of the duties and powers hereby conferred; but three of them at least must join in all acts. I further direct that the number of my said trustees shall be kept at five; and that vacancies shall be filled by the choice of a majority of the Justices of the Supreme Court, the selection to be made from persons of the Protestant Religion."

The Supreme Court of Hawaii held, reversing the Circuit Judge, that this clause gave a naked power of appointing new trustees to a majority of the justices of the Supreme Court, acting in their individual

as distinguished from their judicial capacity; that, therefore, the fact that the Supreme Court as a judicial tribunal was divested of original equity jurisdiction subsequent to the death of Mrs. Bishop, was wholly without effect and that a majority of the justices of the Supreme Court, acting as individuals and as donees of the naked power contained in the Fourteenth clause of Mrs. Bishop's Will, were not deprived of the right of appointment given by the testatrix. Therefore the Court held that the appointment of William Williamson of Honolulu as a successor in trust to Samuel M. Damon, resigned, was rightfully and properly made under the terms of the Fourteenth clause of Mrs. Bishop's Will.

On June 9, 1916, the resignation of Samuel M. Damon as one of the five trustees was accepted by the Circuit Judge possessing original equity jurisdiction, and he was discharged from the trusts, and upon the same day the Justices of the Supreme Court appointed William Williamson a successor in trust to Samuel M. Damon, the appointment being in writing as follows:

"WHEREAS, Samuel M. Damon, one of the Trustees under the Will and of the Estate of Bernice Pauahi Bishop, late of Honolulu, deceased, has resigned his office as such Trustee; and

"WHEREAS, by reason of such resignation a vacancy in said office now exists; and

"WHEREAS, in and by the said Will it is provided that vacancies in the offices of the Trustees under said Will and of said Estate shall be filled by a majority of the justices of the Supreme Court, the se-

lection to be made from persons of the Protestant Religion:

"Now, therefore, Know All Men by These Presents: That the undersigned Justices of the Supreme Court of the Territory of Hawaii, being a majority of the Justices of the said Supreme Court, by virtue and in exercise of the power for this purpose given to them in and by said Will, do hereby appoint William Williamson of the City and County of Honolulu, Territory of Hawaii (a person of the Protestant religion), a Trustee under the said Will and of the said Estate in place of and in succession to the said Samuel M. Damon, resigned.

"In Witness Whereof the said undersigned have hereunto set their hands and seals this 9th day of June, 1916.

"(Signed) A. G. M. Robertson,
"Edward M. Watson,
"Ralph P. Quarles."

The Trustees thereafter, following the procedure that had prevailed in connection with prior appointments of new trustees, petitioned the Circuit Judge at Chambers, possessing original equity jurisdiction, to confirm the appointment of Williamson and fix his bond.

The Circuit Judge, in acting upon the petition, ruled that by the Hawaiian Judiciary Act of 1892, which transferred original equity jurisdiction from the Supreme Court to the Circuit Court, the power to appoint new trustees was no longer possessed by the Justices of the Supreme Court; that the power of appointment was lost *ipso facto* with the Judiciary Act of 1892 becoming operative. On this finding the Circuit Judge proceeded to hold the appointee Williamson disqualified, and made a purported ap-

pointment of the appellant King, the decree being reversed on appeal to the Supreme Court of the Territory and the cause remanded with instructions to dismiss the petition which the Supreme Court found had been unnecessarily brought by the Trustees; that the only petition that could be entertained by the judge possessing original equity jurisdiction would be one asking for fixing and approval of Williamson's bond. In accordance with the opinion of the Supreme Court, the Circuit Judge entered a judgment and decree dismissing all of the proceedings. This decree was dated March 19, 1916, being prior to the filing by appellant King of his appeal to this Court.

JUSTICES OF THE SUPREME COURT OF HAWAII NOT DISQUALIFIED FROM HEARING APPEAL.

Among the grounds of appeal alleged by appellant in seeking a reversal in the case at bar, is one that the Supreme Court of Hawaii erred in not holding that the Justices thereof were disqualified from hearing the appeal from the Circuit Judge, at Chambers, in Equity. In support of this claim of disqualification, counsel for appellant relies upon Section 84 of the Organic Act of the Territory of Hawaii, which provides as follows:

"* * * * no person shall sit as a judge or juror in any case in which his relative by affinity or by consanguinity within the third degree is interested, either as a plaintiff or defendant, *or in the issue of*

which the said judge or juror has, either directly or through such relative, any pecuniary interest, nor shall any person sit as a judge in any case in which he has been of counsel or on an appeal from any decision or judgment rendered by him, and the Legislature of the Territory may add other causes of disqualification to those herein enumerated."

Pecuniary interest, direct or indirect, by the Justices of the Supreme Court of Hawaii in the issue of the case at bar must, therefore, be shown to sustain appellant's contention that the Court was disqualified from hearing and deciding the appeal. Otherwise, the section of the Organic Act relating to the disqualification of judges is wholly without application.

It will be noted that the provisions of Section 84 refer specifically to *pecuniary interest,* direct or indirect in the *issue* of the cause. In this regard the provision is to be distinguished from the wording of the statutes in several of the States, where a field for conjecture and construction is created by the use of the word "interest" alone, without qualification or limitation. Section 84 of the Organic Act, however, is clear and unequivocal in defining the nature of the interest in the *issue* that is to constitute a legal disqualification upon the part of a judge. That interest is defined as a "*pecuniary interest*" in the *issue* of the cause.

There is no possible ground for indulgence in speculation as to the legislative intent in giving effect to Section 84 of the Organic Act. It limits the disquali-

fying effect of judicial interest to "pecuniary interest" direct or indirect in the *issue,* and as held in the decision of the Supreme Court of Hawaii, "the power of appointment delegated to a majority of the justices of this Court in any by the said provision of the Will aforesaid is a naked power without reward or pecuniary benefit to the Justices or any of them."

The statement is contained in appellant's brief that "Section 84 of the Organic Act would be just as potent if it simply made 'interest' of the judge a disqualification." It is plain, however, that the section in question would be materially more potent, if the word "interest" alone were used in the statute. That would leave a field for construction, and might be construed to include cases in which no *pecuniary* interest, directly or indirectly, was involved. Therefore the disqualifying ground under Section 84 is far narrower than would be the case were the nature of the "interest" left in doubt by a failure to limit it to "pecuniary interest," in the issue as is done in Section 84 of the Organic Act.

It seems too clear for argument that the Justices of the Supreme Court of Hawaii, who, acting as individuals, named William Williamson as a successor in trust to Samuel M. Damon, resigned, under the fourteenth provision of Mrs. Bishop's Will, possess no *pecuniary interest* whatever, direct or indirect, in the *issue* of this appeal.

In the case of *Clyma v. Kennedy et al.,* 64 Conn., at page 318, the Court says:

"The interest in a cause which of itself disqualifies a judge from acting therein, is a pecuniary one, similar to the interest which a party in a civil action has in it."

The Court then enumerates the reasons why no disqualification existed, in language clearly applicable in the case at bar:

"He had no pecuniary interest in the subject matter of the action. It was not his own cause. He was not the moving party. He was not liable for costs, nor was it possible for him to receive anything by any judgment which might be rendered. The event of the proceeding could not bring him gain, nor subject him to any loss."

The case of *Inhabitants of Northampton v. Smith,* 11 Met. (Mass.) 390, a decision by Chief Justice Shaw, lays down the rules as to disqualification when the statute simply uses the word "interest" without qualification or limitation to pecuniary interest, as is done in Section 84 of the Organic Act. The Court said:

"We think it is not to be a mere possible, contingent interest; not an interest in the question or general subject, to which the matter requiring adjudication relates; but one that is visible, demonstrable, and capable of precise proof. *Cottle, Appellant,* 5 Pick. 483. *Sigourney v. Sibley,* 21 Pick. 101, and 22 Pick. 507. It is not the bias or prejudice which would be sufficient to set aside a juror. *Davis v. Allen,* 11 Pick. 466. It is to be considered that such an interest, in the judge of probate, is not only to oust him of his jurisdiction, but is to confer jurisdiction on another court of probate, which otherwise would not have it. It must therefore depend upon

facts capable of being precisely averred and proved, and thus put in issue and tried. The importance of this consideration will be appreciated, when it is considered, that if jurisdiction is taken by a probate court, not entitled to it by law, the entire proceedings are void; the practical consequences of which may be extensively injurious. *Holyoke v. Haskins,* 5 Pick. 20. *Coffin v. Cottle,* 9 Pick. 287.

"It must be a pecuniary or proprietary interest, a relation by which, as a debtor or creditor, an heir or legatee, or otherwise, he will gain or lose something by the result of the proceedings, in contradistinction to an interest of feeling, or sympathy, or bias, which would disqualify a juror. *Smith v. Bradstreet,* 16 Pick. 264.

"It must be certain, and not merely possible or contingent. *Hawes v. Humphrey,* 9 Pick. 350. *Wilbraham v. County Commissioners,* 11 Pick. 322. *Danvers v. County Commissioners,* 2 Met. 185. It must be direct and personal, though such a personal interest may result from a relation, which the judge holds as a member of a town, parish or other corporation, where it is not otherwise provided by law, if such corporation has a pecuniary or proprietary interest in the proceedings."

"It may be, and probably is, very true, as the human mind is constituted, that an interest in a question or subject matter, arising from feeling and sympathy, may be more efficacious in influencing the judgment, than even a pecuniary interest; but an interest of such a character would be too vague to serve as a test by which to decide so important a question as that of jurisdiction; it would not be capable of precise averment, demonstration and proof; not visible, tangible, or susceptible of being put in issue and tried; and therefore not certain enough to afford a practical rule of action. It is like the principle applying to the case of the competency of a witness; a direct pecuniary interest, however small, on being proved, renders him incompetent; but the strongest interest from sympathy, from interest in

the question, and even an expected interest in the property in controversy, not yet vested, does not render him incompetent."

The authorities cited by counsel for appellant in support of the claim of disqualification show that the courts, even in construing a statute where the broad term "interest" is used, have frequently limited it to pecuniary interest, for the reasons so clearly set forth by Chief Justice Shaw.

It has been held that signing of a petition and voting for the annexation of territory to a city will not disqualify a judge to hear and determine the question of annexation.

Foreman v. Marriana, 43 Ark. 324.

A judge's interest in a question of law involved in a case before him, due to the fact that its determination will in all probability control rights or remedies which may therefore accrue to him, is not such an interest as will disqualify him.

People v. Edmunds, 15 Barb. (N. Y.), 529.

North Bloomfield Gravel Min. Co. v. Keyser, 58 Cal. 315.

It is said in *People v. Edmunds,* supra,

"A judge is precluded from acting in his official capacity 'in any cause to which he is a party, or in which he is interested' but the prohibition does not extend to cases where the interest is simply some question of law involved in the controversy. The statute very properly stops short of that, as judges must often, and necessarily consider and decide questions which may be applicable to their own rights, or to their property, should they be fortunate enough to possess any."

The case at bar may be said to present a situation analogous to that which would arise if a judge appointed a guardian *ad litem* in a suit pending before him, whose disqualification should later be urged and his removal therefore requested. In that case the judge who appointed the guardian *ad litem* would certainly pass upon the question of disqualification notwithstanding that he, himself, had made the appointment. Similarly, a judge is not disqualified to pass upon the removal of a receiver or a master for cause, although such receiver or master was appointed by him.

In deciding the appeal, the Supreme Court of Hawaii was passing upon a question of law in the determination and issue of which none of the justices possessed, directly or indirectly, the slightest pecuniary interest. It follows, therefore, that no disqualification existed under Section 84 of the Organic Act upon the part of the justices of that Court who, acting as individuals, joined in naming William Williamson as a successor in trust to Samuel M. Damon under the fourteenth provision of Mrs. Bishop's Will.

CLEAR LANGUAGE OF WILL SHOWS POWER OF APPOINTMENT DELEGATED TO JUSTICES AS INDIVIDUALS, AND NOT TO SUPREME COURT AS SUCH. THEREFORE POWER OF APPOINTMENT UNAFFECTED BY TRANSFER OF EXCLUSIVE ORIGINAL EQUITY JURISDICTION TO CIRCUIT COURT.

It is submitted that there is no valid ground to support the contention of appellant that the transfer of original equity jurisdiction by the Hawaiian Judiciary Act of 1892 took with it any right or power that a majority of the justices of the Supreme Court possessed under the fourteenth clause of Mrs. Bishop's Will. By that Act original equity jurisdiction which had been exercised by the Supreme and Circuit Courts was placed exclusively in the Circuit Courts. But the Supreme Court of Hawaii, in its opinion in the case at bar, is very clear in disposing of appellant's contention that this prevented the exercise of the power of filling vacancies in the board of trustees, given by Mrs. Bishop's Will to "a majority of the justices of the Supreme Court."

The Court says:

"By constitutional and statutory provisions prior to the Judiciary Act of 1892 original jurisdiction in equity was vested in the Supreme Court and Circuit Courts. Such jurisdiction was exercised by the chief justice as chancellor, the first associate justice as vice-chancellor, and, subsequent to 1862, by the second associate justice, acting severally and not jointly, and from the decision of the chancellor, vice-chancellor or second associate justice an appeal lay to the Supreme Court *in banco*. (Constitution 1852, Art. 86; Constitution 1864, Art. 68; Compiled Laws 1884, Sections 847, 848.) After the Act of 1878 (see Compiled Laws 1884, p. 389), and prior to the Judiciary Act of 1892, the several justices of the Supreme Court sitting at Chambers, and the several Circuit Judges, exercised original equity jurisdiction. A careful examination of the decisions shows that it was the rule by constitution, statute and practice for a single justice to sit in equity matters, his decision

being subject to appeal to the Supreme Court *in banco*. To this rule, custom or practice there appears to have been only two exceptions, those in the cases of *Tucker v. Estate of Metcalf,* 3 Hawaiian Reports, 180, and *Kalakaua v. Keameamahi,* 4 Hawaiian Reports, 577, where, by agreement, the first named cause was submitted to the chancellor and Hartwell, Justice, and in the latter cause a demurrer was heard in the first instance by the full court, by consent, for the purpose of expediting the decree in the cause and making the decision on the demurrer final, analogous to reserving a question. The very fact that in these two last cases named the submission to more than one justice was by consent tends to show the departure made in these cases from the usual practice in equity matters wherein original jurisdiction in equity was exercised by a single justice sitting in equity at chambers. This practice obtained at the time the Will of the testatrix was written, had obtained for many years prior thereto, and was in force at the time the Will was probated and took effect, hence the provision of the Will under consideration must be construed as being intended to vest and as vesting in the justices of this court as individuals, and not as a court, the power of filling vacancies among the trustees. If the authority to fill such vacancies had been delegated to the police magistrate of Honolulu it would be evident that it was not in the mind of the testatrix that the particular judge or court exercising original equity jurisdiction in the other matters touching the trust should also have power to fill vacancies in the office of trustee under the Will. Inasmuch as the justices of the Supreme Court at the time the Will became effective did not act jointly or as a court *in banco* in exercising original equity jurisdiction, but acted severally, it would be extending the terms of the provision of the Will under consideration to hold that the testatrix intended by the language used that when a trustee under the Will dies or resigns the vacancy thereby

occasioned should be filled by appointment made by the particular court exercising original equity jurisdiction in other matters pertaining to the trust."

In the Matter of the Estate of Bernice Pauahi Bishop, deceased, 23 Hawaiian Reports, 575; Record, 108-119.

The Court thus shows that since the law did not permit a "majority of the Justices of the Supreme Court" to exercise original equity jurisdiction in the manner prescribed in the fourteenth clause of the Will, the reference to the official character—"a majority of the Justices of the Supreme Court"—must be regarded only as a description of the persons who were to execute the power. If the law did not permit the application of original equitable jurisdiction by a majority of the justices of the Supreme Court—and the opinion of the Supreme Court of Hawaii shows conclusively that it did not—then they, at all times, derived their authority from Mrs. Bishop's Will, and the power could in no way be affected by the transfer of original equity jurisdiction to the Circuit Court by the Judiciary Act of 1892.

It is clear from an examination of the Hawaiian Constitutions of 1864 and 1887, referred to by the Supreme Court in its opinion, that parties appearing in an original proceeding in equity were given a constitutional right of appeal, and the exercise of this right was fully provided for by legislative enactment and the rules of practice in the Supreme Court.

Article 68 of the Hawaiian Constitution of 1864 provided for the exercise of original and appellate jurisdiction in equity in the following terms:

"Article 68: The Chief Justice of the Supreme Court shall be the Chancellor of the Kingdom; he shall be *ex-officio* President of the Nobles in all cases of impeachment, unless when impeached himself; and exercise such jurisdiction in equity or other cases as the law may confer upon him; *his decisions being subject, however, to the revision of the Supreme Court on appeal.* Should the Chief Justice ever be impeached, some person specially commissioned by the King shall be President of the Court of Impeachment during such trial."

A similar article is to be found in the Constitution of 1887.

In finding untenable the claim that the testatrix was attempting to delegate a judicial function and pointing out the clear intention of the testatrix as shown by the fourteenth clause, the Court further says:

"It is true that the testatrix in the Will could not delegate a judicial function to any court; that such functions are created by law and not by appointment of individuals. But the naked power of appointing in succession the trustees of the trust is not of itself a judicial function but a power which may be created by the grantor of a trust. If the testatrix had named the chancellor as the person to fill vacancies it might well be contended that she intended that the court exercising original equity jurisdiction should fill vacancies among the trustees under her Will, and, consequently, that when the Chief Justice ceased to be Chancellor and the powers of the Chancellor were transferred to the Circuit Judge sitting in Chambers

in Equity, that it was her intention that the latter should thereafter exercise the power of appointment. We think the conclusion is reasonable that the testatrix in naming a majority of the justices of this court intended that the individuals occupying the offices of chief justices and associate justices, or a majority of them, acting as individuals, should exercise the power of appointment, and not the Supreme Court, and that the language used is merely descriptive of the persons whom she intended to exercise the power. This conclusion is the more reasonable one when we reflect that the testatrix must have known of the changes which occur from time to time in the personnel of the justices of this court."

It is submitted that the Constitutional provisions and the rules of practice made in conformity therewith, cited in the opinion of the Supreme Court of Hawaii, quoted *supra,* show conclusively that the Supreme Court of Hawaii could at no time exercise the original equity jurisdiction conferred upon it by the Constitution through the "choice of a majority of the justices." It was when acting solely in the exercise of *appellate* jurisdiction that the Court could reach a decision by a majority ruling. To have acted in the exercise of original equity jurisdiction through a majority of the justices would have deprived a party litigant of the right of appeal in equity cases, a right provided for in the Constitutional provisions cited.

It follows, therefore, that there is no valid ground to support the contention that the transfer of original equity jurisdiction took with it any right or power that a majority of the justices of the Supreme

Court might possess under the fourteenth provision of Mrs. Bishop's Will.

The case at bar, then, presents unquestionably a situation in which a testatrix named the *majority of the justices of a judicial tribunal to exercise a power of appointment, which they could not have exercised but for the Will.* And it is precisely this situation which has been considered in decided cases and the rule established that the evident intention of the creator of the trust is that the reference to the official character of the donee of the power is to be regarded as a description of the person or persons to execute the power.

The case of *Shaw v. Paine,* 12 Allen (Mass.) 296, shows clearly the principles to be applied when the reference is to the official character of the donee, who is without jurisdiction to act as the power of appointment provided.

In that case a testator in his Will, having constituted three trustees of certain property, provided as follows:

"And whenever any vacancy shall occur in the number of my trustees, I then will and direct that there shall be nominated and appointed such trustee or trustees; and, in such case, the surviving or acting trustees for the time being shall, by an instrument or petition, nominate suitable person or persons to be appointed by the Judge of Probate for the time being such trustee or trustee in the place of the trustee or trustees dying, resigning or removing * * * and in default of such nomination and appointment I direct that a new trustee or trustees

shall in every such case be appointed by the said Judge of Probate, or by one or more of the Justices of the Supreme Court."

It was held that a new trustee nominated as provided for in the Will and appointed by the Judge of Probate, was duly appointed, although the judge gave no notice to persons interested, *since in making the appointment he did not act officially but under the Will.*

In the course of its decision the Court said:

"It is undoubtedly competent for a testator to provide by his will for the substitution of new trustees in case of a vacancy occurring among those first appointed, as much as it is in his power to create the trust. And he may do this directly by naming the persons to be substituted, or by giving a power of appointment. When the power of appointment given by the Will is duly exercised, the trustees take under the Will, and derive their powers from the testator.

"On the other hand, it is equally certain that it is not in the power of the testator to confer upon a judicial tribunal a jurisdiction which is not conferred by law. If, therefore, a testator gives by his will to a judicial officer a power of appointment which the law does not sanction, the reference to the official character must be regarded as only a description of the person who is to execute the power. The duty of making the appointment would not be binding upon him in his official capacity, so that he could be impeached for a wilful neglect or refusal to discharge it, nor, in the case of a judge of probate would an appeal lie from an improper exercise of the power. If the power were duly exercised, the trustee would derive his authority from the will, and not from the judicial act of the officer invested by the will with the appointing power."

Somewhat similar facts were present in the case of *National Webster Bank v. Elridge,* 115 Mass. 424. In that case a testator directed that a "new trustee or that new trustees shall in every such case be appointed by the said judge of probate or by one or more of said justices."

As to whether the proceedings taken in connection with the appointment of a new trustee were valid the Court said:

"Objection is made, in the first place, that the appointment of new trustees successively is invalid because no notice of the proceedings was given in the probate court. But upon such an appointment the judge of probate acts under the authority conferred upon him by the terms of the will, and not by virtue of his general authority as a court or judicial officer under the statutes establishing the court and defining its jurisdiction. *Shaw v. Paine,* 12 Allen 293. It was not a judicial proceeding and therefore required no notice."

The case of *Moore et al. v. Isbell et al.,* 40 Iowa 383, in affirming the rule as to the power of the creator of a trust to provide for the appointment of trustees in succession, also passes on the effect to be given a power of appointment delegated to a person possessing an official character. The Court said:

"It is a familiar doctrine that the grantor of a trust estate may provide, in the instrument creating it, for the succession of trustees, or the transfer of powers from persons or classes of persons named to execute the trust, to others designated to supersede or succeed them. 'The person who creates the trust may mould it into whatever form he pleases; he may

therefore determine in what manner, in what event, and upon what condition the original trustee may retire and new trustees be substituted.' Perry on Trusts, 287; Hill on Trustees, p. 176. Conditions of the character of the one in the deed of trust under which defendants claim title, providing for the appointment of a trustee to succeed the one named, are not infrequently found in instruments of this character, and, so far as we are advised, have always been held valid and the acts of the trustees appointed under them upheld. The grantor may provide in the instrument that the new trustee shall be appointed by the creditor, the *cestui que* trust, or by some officer, as judge of probate, county judge, etc., or by an individual named filling a specified office and his successors in office. If the apointment be made in the manner provided, the new trustee will thereby become clothed with all the powers conferred by the deed upon the person therein designated."

To the objection that the power was not valid because not exercised by the individual who occupied the office of county judge at the time the trust deed involved in the case was executed, the Court said:

"It is insisted that the condition of the deed of trust authorizing the 'acting county judge' to appoint a successor to the trustee named conferred that power upon the person then filling the office of county judge, the words designating the office being *descriptio personarum*. The language warrants no such conclusion. It conferred the power of apointment upon the individual who filled the office of county judge at the time the appointment should be demanded."

In the case at bar it was the obvious intention of the testatrix to place the power of appointing successors in trust in the hands of the individuals who would occupy the highest judicial offices in Hawaii.

The fourteenth clause of the Will refers solely to individuals, "a majority of the Justices of the Supreme Court." As has been shown, a majority of the Justices of the Supreme Court could at no time, in the exercise of the Court's original equity jurisdiction, act in the manner prescribed in the Will in the appointment of new trustees. In the language of *Shaw v. Paine,* supra, the duty of making the appointment under Mrs. Bishop's will would not have been binding upon a majority of the Justices of the Supreme Court in their official capacity, so that they could be impeached for a wilful neglect or refusal to discharge it.

Since the Supreme Court, at the time testatrix's Will became operative, acting in the exercise of original equity jurisdiction by *one* of the justices thereof, did possess the authority to appoint trustees, the fact that the testatrix provided for an appointment of successors in trust by a *majority* of the justices shows the intention of the testatrix to distinguish between the Supreme Court as a judicial tribunal and a majority of the individuals occupying the highest judicial offices in the country in which she desired to place the responsible power of selecting successors in trust, and thus in a most vital particular provide for the successful administration of the great charitable trust created by her.

In 39 Cyc. at page 281, entitled "Trusts," it is said, referring to the power of Courts of Equity to appoint new trustees:

"It exists and will be exercised whenever there is failure of suitable trustees to perform the trusts either from original or supervenient incapacity to act. Therefore if the author of the trust fails to name trustees or makes no provision for appointment, or if doubt exists as to the person intended, or if the one named is incompetent or otherwise incapable of executing the trust, or dies, or resigns, or is removed, or if from any other cause there is a failure of a regularly appointed trustee, Courts of Equity will take upon themselves the due execution of the trusts and, if necessary, will appoint other trustees to carry the trust into effect * * *"

None of the conditions calling for the exercise of original equity jurisdiction, as laid down in the foregoing statement of the rule, are to be found in the case at bar.

It is elementary that the creator of a trust possesses inherent power to effectuate the purpose of its creation and safeguard its continuance by setting down the manner in which successors in trust are to be chosen upon the contingency of a vacancy occurring. If the method provided contravenes no rule of positive law, it is recognized and enforced. In the case at bar, a reference to the Will identifies the donees of the power; they are willing and qualified to exercise the power given them and do exercise it. The plain intention of the testatrix is carried out and the appointment is made in the manner prescribed in the Will.

It is submitted that it has been clearly shown that under a proper construction of the fourteenth clause of Mrs. Bishop's Will the power of appointing suc-

cessors in trust resides in the Chief Justice and Justices of the Supreme Court of Hawaii as individuals or a majority of them; that since the law did not permit the exercise of original equity jurisdiction by a majority of the Justices of the Supreme Court the sole authority possessed by "a majority of the justices of the Supreme Court" to appoint trustees was derived from Mrs. Bishop's Will.

It was, therefore, not a power attaching to the Court or the justices thereof in a jurisdictional sense. The power to appoint successors in trust was an authority derived solely from the Will, and it is clear, as shown in the opinion of the Supreme Court, that the power could not be affected by changes in the matter of the exercise of original equity jurisdiction.

The case of *In re Estate of Bernice Pauahi Bishop,* 11 Haw. 33, is cited in appellant's brief and was erroneously relied upon by the trial court in reaching the finding that was subsequently reversed on appeal. The case dealt with the construction of the following language contained in the thirteenth clause of Mrs. Bishop's Will, as follows:

> "I also direct that my said trustees shall annually make a full and complete report of all receipts and expenditures and of the condition of said schools to the Chief Justice of the Supreme Court, or other highest judicial officer in this country."

At the time the Will became operative and up to the time of the passage of the Judiciary Act of 1892, the Chief Justice as Chancellor did possess the au-

thority to exercise original equity jurisdiction in passing upon trustees' accounts in the manner called for by the thirteenth clause. The annual settlement of the trustees' accounts having been entertained as part of the Court's original jurisdiction in equity prior to 1892, the Court held that it passed to the Circuit Court by the terms of the Judiciary Act. The Chief Justice possessed the power, at the time Mrs. Bishop's Will became operative, to act in the settlement of trustees' accounts precisely in the manner called for by the provisions of the thirteenth clause. Therefore the reasoning of Justice Whiting that the clause could be construed as meaning "other highest judicial officer' having judicial jurisdiction over the subject matter of the same nature as this—that is, annual settlement of trustees' accounts under a will probated heretofore in the Supreme Court— and that such highest judicial officer would now be one of the Judges of the First Circuit Court."

It is clear that this reasoning has no application to the case at bar. It belongs to that class of cases cited by the appellant to the effect that when the judge of a certain court charged with the sole exercise of original jurisdiction of a particular subject, for instance, equity or probate, is vested with the power of filling vacancies among the trustees of a trust by the instrument creating the trust, that the grantor intended to vest the *court* with such power and not the *judge as an individual* who presides over such Court. As the Supreme Court of the Territory

observes, such authorities are not in point in the case at bar.

In the Matter of the Estate of Bernice Pauahi Bishop, deceased, 23 Haw. 582; Record, p. 118.

The case of *Carr v. Corning,* 73 N. H. 362, 62 Atl. 168, also cited by appellant in support of his contention, is clearly distinguishable from the case at bar for the same reasons that apply to the decision of the Supreme Court of the Territory in the matter of settling the trustees' accounts.

In *Carr v. Corning* a testator in his will provided for the filling of vacancies on the board of trustees by appointment "to be approved by the Judge of Probate for the County of Merrimack for the time being."

The probate judge took the view that the power of approval was given to him as an individual and he refused to entertain in his judicial capacity a petition for the approval of new trustees. Mandamus was brought and the question came before the Supreme Court of New Hampshire.

It was held that the judge of probate was under a duty to act exactly in the manner prescribed in the testator's will, and the Court said that it was obviously the intention of the testator to refer to the probate court as such, in his use of the common reference of "probate judge." And the controlling presumption in the mind of the Court was the fact that the law made it the duty of the probate court to act,

as the testator provided, without reference to the will.

In considering the question involved in the case the Court said:

"There is no force in the defendant's first position. In title 25 of the Public Statutes, entitled "Courts of Probate, and Estates of Deceased Persons," the words "judge" and "judge of probate" are constantly used when it is apparent that the probate court is intended. For example, Chapter 182, Pub. St. 1901, is entitled "Judges of Probate and their Jurisdiction." It is a matter of common knowledge that, when a person attending to probate business or considering probate matters speaks of referring anything to the judge of probate, he usually intends the probate court, and not the person who exercises the function of that office. That is probably the sense in which Mr. Pearson used the words of the will, for the probate court has jurisdiction of wills and of the estates of deceased persons. Pub. St. 1901, 6, 182, Sec. 2. When he provided that the persons to administer the trust he was creating should be appointed by the judge of probate, there is a presumption that the probate court was intended; and the fact that the law makes it the duty of that court o approve the apointment of trustees, as will hereafter appear, makes that presumption so strong that the mere addition of the words 'for the time being' is not enough to rebut it."

The presumption as to the intention of the testator as indulged in by the New Hampshire court, would not be applicable in the case at bar, for the law not only did not make it the duty of "a majority of the Justices of the Supreme Court" to appoint new trustees, but the law actually made it impossible for a majority of the Justices to act ju-

dicially in the exercise of original equity jurisdiction, as required by the fourteenth clause of Mrs. Bishop's Will.

It is submitted that this Court will regard as authoritative and controlling, as a construction of local law and practice, the decision of the Supreme Court of Hawaii that a majority of the Justices of the Supreme Court at no time possessed the power to exercise original equity jurisdiction as is called for in the appointment of new trustees. This Court has held that the construction which the Supreme Court of the territory has put upon local law is entitled to great weight.

Hawaii County v. Halawa Plantation, Limited, 239 Fed. Rep. 836.

The Supreme Court of the United States has applied a similar rule in deciding cases brought to it from the Territory.

Keahola v. Castle, 210 U. S. 149; 52 L. Ed. 998.

Cotton v. Hawaii, 211 U. S. 162; 53 L. Ed. 131.

Kapiolani Estate v. Atcherly, 21 Haw. 441; 238 U. S. 119.

John Ii Estate v. Brown, 235 U. S. 342; 59 L. Ed. 259.

In conclusion, it is submitted that it has been shown that the Justices of the Supreme Court of Hawaii who joined in the appointment of Williamson, under the power given in Mrs. Bishop's Will, were not disqualified from hearing and determining the appeal by reason of pecuniary interest in the issue, and that the proper and reasonable construc-

tion of the fourteenth clause of the will shows that the power of appointment was reposed in the justices as individuals and therefore was unaffected by changes in the local law relating to the exercise of original equity jurisdiction.

For the foregoing reasons the decree of the Supreme Court of Hawaii should be affirmed.

Respectfully submitted,

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Dated, Honolulu, October 1, 1917.